LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 19 1973
MICHAEL ROBAK, JR., CLERK

No. 73-671

In the

Supreme Court of the United States

OCTOBER TERM, 1973

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN BORST, JR.
FRANCIS J. MCCONNELL
RICHARD P. CAMPBELL
134 South LaSalle Street
Suite 1110
Chicago, Illinois 60603
Counsel for Petitioners

Of Counsel:
McCONNELL, MAHON & BORST
134 South LaSalle Street
Chicago, Illinois 60603
312-726-9131

© The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement Of The Case 4

Argument 11

I. The Court Of Appeals For The Seventh Circuit Has Incorrectly Decided An Important Question Concerning The Commerce Provisions Of Section 2(a) Of The Clayton Act, as Amended, Which Should Be Settled By This Court 11

II. The Decision Of The Court Below Conflicts With The Unanimous Decision Of This Court In *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) 12

Conclusion 17

Appendix

1. Opinion and Judgment of the Court of Appeals 1a
2. Opinion of District Court granting judgment N.O.V. 23a
3. Findings and Conclusions of District Court granting partial summary judgment on issue of counterclaim liability 27a
4. Opinion of District Court with respect to counterclaim jurisdiction 33a

PAGE

CITATIONS

CASES:

Borden Company v. *Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964) 6

Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) 6, 9

MISCELLANEOUS:

H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936) 11

Report of Conf. Committee, H.R. Rep. No. 2951, 74th Cong., 2d Sess. 1-9 (June 8, 1936) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

MAYER PAVING AND ASPHALT COMPANY, an Illinois corporation, and LEE O. MAYER, sole surviving partner of Mayer Paving Company, a co-partnership,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION, a Delaware corporation, and MATERIAL SERVICE CORPORATION, a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Mayer Paving and Asphalt Company and Continental Illinois National Bank and Trust Company of Chicago, as Administrator of the Estate of Lee O. Mayer, deceased, respectfully pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 1, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, Mr. Justice Clark dissenting, is not yet reported but appears in the Appendix hereto (App. 1a). The opinions of the District Court for the Northern District of Illinois, Eastern Division, are unreported but also appear in the Appendix hereto (App. 23a, 27a, 33a).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 1, 1973 (App. 23a). Petition for rehearing was not filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the commerce requirements of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, are met when an Illinois seller of crushed stone which is admittedly engaged in commerce and is admittedly discriminating in price in the course of such commerce sells stone to certain Illinois customers at substantially higher prices than those charged other competing Illinois customers and those charged Indiana customers.

2. Whether F.R.C.P. Rule 19(a)(2)(i) permits a person upon his own motion to inject himself into an action as a party defendant where the only jurisdictional ground relied upon is that the party has a "counterclaim" it alleges "is compulsory" even though plaintiff asserts no claim against the person and no other independent jurisdictional ground exists to support the alleged counterclaim.

STATUTES INVOLVED

The statutes involved are:

1. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, §1, 49 Stat. 1526, 15 U.S.C. §13(a), which in pertinent part provides:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." (Emphasis supplied).

2. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §15 which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

3. Rule 19(a)(2)(i) of the Federal Rules of Civil Procedure which provides:

> "Rule 19. Joinder of Persons Needed for Just Adjudication.
>
> (a) Persons To Be Joined If Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if. . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest. . . ."

STATEMENT OF THE CASE

Mayer Paving and Asphalt Company, a corporation, and Lee O. Mayer, as surviving partner of Mayer Paving Company, a partnership, filed this action in 1969 pursuant to 15 U.S.C. §15 against respondent, General Dynamics Corporation, for treble damages based on defendant's sale of crushed limestone during the 1958-1968 period to Illinois and Indiana asphalt manufacturers and paving contractors, including petitioners, at discriminatory prices in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. §13(a).[1] The complaint, as amended, sought damages for the entire period on the ground that General Dynamics Corporation had fraudulently concealed its price discrimination practices from plaintiffs.

Although the complaint named General Dynamics as the sole defendant, a General Dynamics' subsidiary,

---

[1] During the appeal below, Lee O. Mayer died, and Continental Illinois National Bank and Trust Company of Chicago as Administrator was substituted in decedent's place and stead.

respondent Material Service Corporation, appended counterclaims for mortgage foreclosure and for the balances due on a promissory note and open account to General Dynamics' answer. Prior to December 31, 1959, Material Service was a separate corporate entity. On that date, General Dynamics by merger acquired the assets of Material Service and thereafter operated it as a division of General Dynamics until March 31, 1969, when Material Service was reincorporated.

The action was tried before a jury, which, after three weeks of testimony, rendered a verdict in favor of petitioner, Mayer Paving and Asphalt Company, and against General Dynamics Corporation. Judgment was entered on the jury verdict in the trebled amount of $498,204. During the course of the trial the District Court directed a verdict for General Dynamics on the issue of fraudulent concealment, thereby eliminating the partnership claim in its entirety and limiting Mayer Paving and Asphalt Company's corporate claim to the four-year period immediately preceding filing of the complaint. The District Court further directed a verdict in favor of Material Service Corporation and against petitioners in the amount of $359,849 on Material Service's counterclaims, having previously granted partial summary judgment on the issue of liability.[2]

General Dynamics thereafter filed its motion for judgment N.O.V. or alternatively for a new trial. The District

[2] The motion for partial summary judgment was opposed on the ground that the District Court was without jurisdiction of the counterclaims and further that the counterclaims were subject to the defense of recoupment to the extent petitioners' claims were barred by the statute of limitations. The Court below did not reach the fraudulent concealment, recoupment and directed verdict issues because of its ruling on the commerce issue (App. 11a).

Court granted judgment N.O.V. but subsequently denied the alternative new trial motion.

Judgment N.O.V. was granted solely and exclusively on the basis of the District Court's interpretation of the commerce provisions of Section 2(a) of the Clayton Act, as amended. In its memorandum opinion the Court acknowledged that General Dynamics did "substantial business in Indiana" as well as Illinois from its Chicago headquarters and Illinois quarries (App. 24a). Nevertheless, the Court concluded that the substantial price differences charged paving contractors within Illinois as well as like substantial price differences charged Illinois contractors (higher) as compared to Indiana contractors (lower) could not be compared in determining whether either or any of the discriminatory sales were in commerce. The District Court reached this conclusion reluctantly, stating (App. 26a):

> "If this case were one of first impression coming upon the heels of the *Moore* case, this court would not have made the distinction outlined above in determining whether jurisdiction existed under the 'in commerce' requirements of the act. This court would have found that a showing of substantial interstate sales of like goods is sufficient to satisfy the jurisdictional requirements.
>
> "This however is not a case of first impression and this court feels compelled to follow the holding in the *Borden* case. If the *Borden* case is not the law of this Circuit it is up to the Court of Appeals to say so."[3]

---

[3] The reference to *Borden* is the decision of the Seventh Circuit in *Borden Company* v. *Federal Trade Commission,* 339 F.2d 953 (1964).

On appeal, the court below, Mr. Justice Clark dissenting, affirmed the judgments of the District Court on the ground that, although *Borden* was inapplicable, petitioners nevertheless had failed to establish the third commerce requirement of Section 2(a).

Both the majority opinion and that of Mr. Justice Clark in dissent were in substantial agreement with respect to the facts shown of record. Lee O. Mayer and her husband, Sidney R. Mayer, Sr. operated an asphalt paving business as a partnership until the latter's death in 1964. Prior to Mr. Mayer's death, the asphalt manufacturing facility, as opposed to the paving business, was operated by Mayer Paving and Asphalt Company, a corporation. Thereafter, the paving business was absorbed by the corporation. The Mayers engaged in the aphalt paving business during the entire 1958-1968 period and purchased substantially all of their crushed limestone requirements for paving as well as asphalt manufacture from General Dynamics Corporation. During the decade, Mayer's purchases from General Dynamics amounted to $5.4 million (App. 17a).

General Dynamics' Material Service Division operates five quarries, all located in Illinois. The Thornton quarry — perhaps the largest commercial quarry in the world — is located only a few miles from the Indiana border. As Mr. Justice Clark noted, the Thornton quarry was the nearest source of crushed limestone for contractors in the Northwest Indiana area, especially East Chicago, Hammond, Gary and nearby cities. During the 1958-1968 period General Dynamics' quarries produced between ten and twelve million tons of crushed limestone. In addition, General Dynamics maintained eleven distribution yards, including a yard at Gary, which supplied bulk aggregates, and a sales office at LaPorte, Indiana (App. 17a).

The record further shows that in 1968 total sales of products from General Dynamics' quarries to customers in Illinois and Indiana amounted to approximately twenty-nine million dollars. The four Indiana paving contractors who testified, alone purchased over $4.5 million of crushed limestone and other products from General Dynamics' Illinois quarry during the decade in question.

As the majority of the Court noted, the jury concluded that General Dynamics had been guilty of charging Mayer Paving higher prices for stone than it charged Mayer's paving competitors. Further, the jury was unconvinced by General Dynamics' alleged cost justification and other claimed defenses (App. 3a). Elaborating on the evidence of price discrimination, Mr. Justice Clark pointed out that the Indiana contractors, one of whom (A. Metz, Inc.) competed with Mayer, paid from 20¢ to 30¢ less per ton than General Dynamics was regularly charging Mayer. The Justice also noted that the record showed that General Dynamics favored Illinois customers in competition with Mayer and such customers were regularly charged between 10¢ and 47¢ per ton less than Mayer was forced to pay. The price discrimination proofs, as Mr. Justice Clark noted, "were uncontradicted at the trial" (App. 18a).

In reaching its decision, the majority of the Court did not quarrel with the jury, but concluded that it was "presented with a pure question of statutory interpretation" (App. 5a) concerning the commerce requirements contained in Section 2(a) which it held to entail three tests in order to establish jurisdiction (App. 4a):

> "[F]irst, the discriminator must be 'in commerce'; second, the challenged discrimination must occur 'in the course of such commerce'; and third, 'either or any of the purchases involved in such discrimination are in commerce. . . .'"

The majority conceded that the first two requirements were clearly met, but concluded that petitioners had failed to establish the third requirement. It did not dispute the fact that the Mayers had suffered severe discrimination in their purchases in comparison with their Illinois competitors but held that the substantially lower prices charged Indiana contractors could not be compared under the third commerce test because the Mayers were not effective competitors in the Northwest Indiana area.

Mr. Justice Clark vigorously dissented from the conclusion of the majority, stating that the interpretation "if finally sustained, . . . will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C., §13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954)" (App. 16a).

Mr. Justice Clark further stated (App. 18a):

> "It appears to me that a plain reading of §2(a) prohibits such discrimination. It provides that if '*either* or *any* of the purchases involved in such discrimination *are in commerce*' then all are prohibited. The majority interprets the all-inclusive phrase 'either or any' to apply to sales to Mayer only insofar as the presence of commerce is concerned. *Mead's Fine Bread* holds the opposite. Here the allegation and proof, uncontradicted, are that some local sales (from the same Illinois quarries) in Illinois as well as interstate ones to Indiana customers were at much lower prices than like sales to Mayer and other Illinois customers. I always thought that this was a practice that §2(a) was specifically intended to prohibit. . ."

Finally, Mr. Justice Clark squarely took issue with the majority's effort to distinguish *Moore* on the ground that it involved primary line competition rather than secondary line competition. "To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts" (App. 20a). In his view the original judgment in favor of Mayer Paving and Asphalt Company should have been reinstated.

ARGUMENT

I.

The Court Of Appeals For The Seventh Circuit Has Incorrectly Decided An Important Question Concerning The Commerce Provisions Of Section 2(a) Of The Clayton Act, As Amended, Which Should Be Settled By This Court.

The majority of the Court below has given the commerce provisions of Section 2(a) an interpretation which, if allowed to stand, will effectively preclude relief under that statute for local businessmen attempting to cope with price discrimination in the purchase of commodities from large size interstate sellers. This conclusion was not dictated by any defect in proof, but rather was deemed to follow as "a pure question of statutory interpretation" of the commerce provisions of Section 2(a). The majority regarded the question as one of "first impression" involving a statute where "'congressional intention is unusually difficult to decipher'" (App. 5a, 6a, 7a).

In our view, the conclusion reached below is completely inconsistent with the purpose of the Robinson-Patman Act amendments to Section 2 of the Clayton Act which were intended by Congress to expand rather than restrict the ability of local victims of price discrimination to obtain redress under the statute. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936). The words of Section 2(a), "where either or any of the purchases involved in such discrimination are in commerce", have now been flatly interpreted by the Seventh Circuit to mean that only purchases by actual competitors may be considered in determining whether this commerce prerequisite is met.

The result is that a large interstate seller of essential commodities may freely discriminate among local purchasers, charging substantially lower prices to some of such local competitors as well as to out-of-state customers, as long as the overcharged customer does not compete, or is effectively foreclosed from competing, outside the state.

The Seventh Circuit's interpretation of the commerce provisions of the statute finds no support in the congressional history surrounding adoption of the Robinson-Patman Act. Indeed, the Conference Committee Report on the Robinson-Patman Act, which rejected certain language contained in the House version of the bill making price discrimination unlawful by "any person, whether in commerce or not", states that such language was "omitted" because the Committee was of the opinion that the language of the Act as adopted "*already covers all discriminations, both interstate and intrastate, that lie within the limits of Federal authority.*" (Report of Conf. Committee, H.R. Rep. No. 2951, 74th Cong., 2d Sess. 1-9 (June 8, 1936) (Emphasis supplied).

We submit that neither the language of the commerce provisions of Section 2(a) nor the legislative history supports the construction of the Court below, a construction which will destroy any effective protection for local businessmen who are victims of otherwise illegal price discrimination.

II.

The Decision Of The Court Below Conflicts With The Unanimous Decision Of This Court In Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

We previously observed that the District Court submitted this case to the jury in the belief that the com-

merce principles here involved were indistinguishable from those applied by this Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). After the jury returned a verdict favorable to Mayer Paving and Asphalt Company and judgment was entered thereon, he nevertheless reluctantly granted judgment N.O.V. because, despite the decision of this Court in *Moore,* he felt obliged to follow the decision of the Seventh Circuit in *Borden Company* v. *FTC,* 339 F.2d 953 (7th Cir., 1964) the rationale of which the trial judge could not distinguish from the instant case.

It now appears from the opinion below that the majority did not consider its *Borden* decision as controlling and has attempted to distinguish *Moore* on grounds which constitute a *non-sequitur.*

In *Moore* the plaintiff was engaged in a bakery business at Santa Rosa, New Mexico, where it sold bakery products to customers in the local vicinity. Its business activities were purely intrastate in nature. The defendant Mead was similarly engaged in the baking business at Clovis, New Mexico. Mead, however, also sold its bakery products in Farwell, Texas, a border town served with a bread truck operating out of Clovis.

Defendant Mead initiated a price war in Santa Rosa through bread price reductions, but did not lower its bread prices in Farwell, Texas. Plaintiff recovered a treble damage judgment for injury of its business resulting from Mead's Santa Rosa price reduction, but the judgment was reversed by the Tenth Circuit on the sole ground that "competitive injury resulting from [defendant's] sale was to a purely local competitor whose business was in no way related to interstate commerce" (208 F.2d at p. 780).

On certiorari, this Court reversed on the ground that defendant's sales in Santa Rosa, New Mexico, and Farwell, Texas could be compared to prove price discrimination in commerce within the meaning of §2(a) despite the fact that (1) the only connection that Mead's Clovis Bakery had with interstate commerce was that defendant happened to send a daily bread truck to Farwell, Texas; (2) that the plaintiff did no business in Farwell, Texas or anywhere outside the State of New Mexico, and (3) that the competitive injury was wholly local in nature and resulted solely from Mead's local sales in Santa Rosa which did not occur in or involve interstate commerce. In so holding, Mr. Justice Douglas speaking for a unanimous Court declared at p. 119-120:

> ". . . The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources . . . Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business."
>
> • • •
>
> ". . . Congressman Utterback, manager of the bill in the House, included this type of case in the price cutting that he claimed was outlawed: 'Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade.'"

Here, as in *Moore*, the fact that the Mayers are essentially local businessmen should not deprive them, any more than *Moore*, of Robinson-Patman Act protection

against price discrimination by an enterprise engaged in interstate commerce.

Because of the importance of *Moore* on the commerce issue in this case, we have examined this Court's record in order to determine what amount of interstate business Mead actually did in Farwell during the period of the local price war which destroyed plaintiff's business. The record establishes that during the period of the price war, Mead had sales of $2,302 in Farwell which represented approximately 1.7% of its total sales of $135,129, all of the remainder of which were wholly intrastate in nature (Cert. No. 121, Oct. Term, 1954, Transcript of Record, p. 217). This minuscule amount of interstate sales should be compared with Material Service's sales to the four Indiana paving contractors who testified in this case which totaled $4.5 million during the 1958-1968 period at prices 20¢ to 30¢ less per ton than those charged petitioners.

Unable to rationally distinguish *Moore*, the majority relies instead on the unreasoned distinction that *Moore* was a primary line rather than a secondary line case. This purported difference between primary and secondary line cases, so far as the commerce prerequisites are concerned, is not explained in terms of the statutory language of the Robinson-Patman Act or the congressional history of the statute.

In *Moore*, for example, let us assume that the plaintiff had been a Santa Rosa merchant rather than a baking company. Assume further that Mead sold its bread to merchants in Farwell and Clovis at full price, but in Santa Rosa sold at one-half price to a chain store while extracting the full price from our merchant plaintiff who

competes with the chain. Would this Court have affirmed dismissal of the action on commerce grounds merely because the hypothetical plaintiff was a merchant rather than a baking company and the case classified as a secondary rather than a primary line action?

We believe it would not have so done because no rational basis exists for a distinction on the question of commerce. As Mr. Justice Clark observed in dissent (App. 20a):

> "The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co., supra,* is inapposite because it involved primary competition between Moore and Mead. I find nothing in §2(a) that limits its coverage to primary competition cases. . . To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts."

We believe the Court below, in refusing to follow this Court's decision in *Moore,* failed to recognize that decision's controlling significance despite Mr. Justice Clark's dissenting opinion. As Mr. Justice Clark stated, the majority's decision "will severely restrict the holding" in *Moore,* and cannot be reconciled with that decision (App. 16a, 20a). The decision below is in square conflict and should be reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN BORST, JR.
FRANCIS J. MCCONNELL
RICHARD P. CAMPBELL
Counsel for Petitioners
134 South LaSalle Street
Suite 1110
Chicago, Illinois 60603
312-726-9131

Of Counsel:
MCCONNELL, MAHON & BORST
134 South LaSalle Street
Suite 1110
Chicago, Illinois 60603
312-726-9131

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

September Term, 1972 — April Session, 1973

Nos. 72-1613, 72-1703 and 72-1704

Mayer Paving and Asphalt Company, an Illinois corporation, and Lee O. Mayer, sole surviving partner of Mayer Paving Company, a co-partnership,
Plaintiffs and Counter-Defendants, Appellants and Cross-Appellees,

vs.

General Dynamics Corporation, A Delaware corporation and Material Service Corporation, A Delaware corporation,
Defendants and Counter-Claimant, Appellees and Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 1803
J. Sam Perry, *Judge.*

Argued May 25, 1973 — Decided October 1, 1973

Before Clark, *Associate Justice,** and Pell and Sprecher, *Circuit Judges.*

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

PELL, *Circuit Judge.* Mayer Paving and Asphalt Company and Lee O. Mayer appeal from a judgment in favor of Material Service Corporation, a subsidiary of General Dynamics Corporation, on its counterclaim and from a judgment n.o.v. in favor of defendants on plaintiff's complaint. Plaintiffs alleged that they had been the victims of illegal price discrimination in the sale by General Dynamics of crushed limestone which plaintiffs used in their paving business. The price discrimination was charged to be a violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act, §1, 49 Stat. 1526, 15 U.S.C. §13(a).[1] General Dynamics Corporation's subsidiary, Material Service, counterclaimed for foreclosure of a mortgage and for the balance due on a promissory note and open account, most of which arose out of the course of dealing between Mayer Paving and General Dynamics. On this appeal, Mayer Paving raises two principal issues: first, the propriety of the district court's grant of judgment n.o.v., and second, the jurisdiction of the district court to enter a judgment against plaintiffs on Material Service's counterclaim.

---

[1] 15 U.S.C. §13 provides in pertinent parts:

"(a) It shall be unlawful for any person engaged in commerce, in the coures of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Lee O. Mayer and her husband, Sidney R. Mayer, Sr., operated Mayer Paving Company as a partnership until the latter's death in October 1964. Thereafter, the business was incorporated as Mayer Paving and Asphalt Company. The plaintiffs will hereinafter be referred to collectively as Mayer Paving. Mayer Paving engaged in the asphalt paving business at all material times and had its principal place of business in Skokie, Illinois. Material Service Corporation was originally organized to produce and distribute crushed limestone, sand, and other aggregates in the paving and construction business. On December 31, 1959, General Dynamics Corporation acquired the assets of Material Service Corporation through a statutory merger. Thereafter Material Service was operated as a division, Material Service Division, until it was reincorporated as a wholly owned subsidiary in March 1969.

Material Service operates five quarries in the Chicago area and sells to paving and construction contractors in Indiana and Illinois. Mayer Paving alleged and the jury from its verdict apparently concluded that during all relevant times[2] Material Service was guilty of charging Mayer Paving higher prices for stone than it charged Mayer Paving's competitors. The jury was unpersuaded by Material Service's evidence concerning the cost and other claimed justifications of the various price differences.

Following the entry of judgment on the jury's verdict, General Dynamics and Material Service moved for judgment n.o.v. on the ground that Mayer Paving had not established the jurisdictional prerequisite for a Robinson-Patman Act suit. The district court granted the motion in a memorandum opinion dated June 9, 1972. The court

---

[2] The district court ruled that only the period within the four year statute of limitations, i.e., subsequent to August 29, 1965, would be considered, as Mayer Paving had failed to establish fraudulent concealment. Because of the conclusion we have reached on the scope of the Act, we do not find it necessary to consider this point.

based its decision on its opinion that the factual situation here involved fell within the ambit of *Borden Company* v. *Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), rather than *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). The district court concluded that *Borden* held that the Robinson-Patman Act did not cover a customer's action for price discriminations when all of the properly challengeable sales were intrastate.

Section 2(a) of the Clayton Act, as amended, requires three different types of "in commerce" (i.e., interstate commerce) tests to be satisfied before jurisdiction can be established: first, the discriminator must be "in commerce"; second, the challenge discrimination must occur "in the course of such commerce"; and third, "either or any of the purchases involved in such discrimination are in commerce. . . ." "The first two elements of the statutory 'commerce' provision are of lesser import. . . . Of prime decisional significance . . . is the test that the challenged discriminatory transaction must itself occur 'in' commerce. Under that test, the applicability of Robinson-Patman is determined by this rule of thumb: at least one of the two transactions which, when compared, generate a discrimination must cross a state line." Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), §4.9, at 78-79. Such is the case in the present controversy as defendant does not challenge that it is itself "in commerce" and that the discrimination may have occurred in the course of commerce. The parties are deadlocked on whether or not the third "commerce" requirement has been met. Mayer Paving may not avail itself of the seemingly applicable language of §3 of the Robinson-Patman Act, 15 U.S.C. §13(a), since that section provides no private right of action. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373 (1958).

Mayer Paving contends in reliance upon *Moore* that, since Material Service sold to a number of firms in Indiana at prices lower than those given Mayer Paving, the third commerce requirement has been satisfied: ". . . once having established discrimination in commerce within

the meaning of §2(a), proof of competitive injury is sufficiently demonstrated when it is shown that Mayer Paving and other Illinois contractors are consistently charged substantially higher stone prices than their local competitors as well as Indiana contractors."

General Dynamics, on the other hand, contends that in a case of second-line discrimination, that is one in which the customers of the discriminator sue for damages to competitive position, such as is alleged by Mayer Paving, one of the discriminatory sales which is "in commerce" must be either to the plaintiff or to a competitor of the plaintiff. "That MS [Material Service] may have made interstate sales to Indiana contractors is irrelevant.[2a] Those Indiana contractors did not compete with Mayer, nor did the southern Cook County contractors who did small amounts of business in Indiana. . . . Therefore, this case only involves sales by MS of crushed limestone produced in Illinois to Mayer and its competitors for use in Illinois." We are thus presented with a pure question of statutory interpretation.[3]

[2a] This apparent concession by General Dynamics is obviously of an arguendo nature for it is footnoted in the brief as follows: "Actually, since the Indiana contractors picked up their stone at MS's Thornton [sic] Quarry, it is hard to see how even those sales can be 'in commerce.'" Noting that this factual assertion was not denied in Mayer's reply brief, we agree that the sales to Indiana contractors, as to whom Mayer did not claim any status of competition or even potential competition, were not sales "in commerce." The sales transactions completed at the quarries, all of which were in the state of Illinois, were clearly intrastate sales.

[3] Mayer Paving has not argued in this court that its activities in Indiana, which might be characterized as *de minimis*, brings it into competition with Indiana contractors. At trial, counsel for defendants established on cross-examination that Mayer Paving's Indiana contracts barely involved purchases from Material Service with most of the work being sublet.

Initially, we should note that the scope of the Robinson-Patman Act amendments to the Clayton Act is significantly different from the Sherman Act's in this very requirement that one sale be "in commerce." *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077; *A. Cherney Disposal Co.* v. *Chicago & Suburban Refuse Disposal Association*, No. 72-1303 (7th Cir., filed June 28, 1973) (slip op. p. 5). In contrast to the specific requirements of the Robinson-Patman Act, "it appears settled that only those activities are beyond the reach of the Sherman Act which are 'purely local' in the double sense that they (1) are not within the flow of interstate commerce and (2) have no significant effect on that flow." ABA, ANTITRUST DEVELOPMENTS 1955-1968, 39 (1968). Thus, we do not presently need to consider whether Congress has the power to reach such discriminations as are alleged by Mayer Paving. What we must determine is whether Congress intended to reach such discriminations.

"The Robinson-Patman Act as a whole was the product of such a complex series of interrelated legislative proposals that congressional intent is unusually difficult to decipher." Recent Cases, 86 HARV. L. REV. 765, 769 (1973). This is particularly true of the phrase requiring one of the sales to be "in commerce." *Compare* Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1166 n. 46 (1958) *with* Recent Cases, *supra*, 86 HARV. L. REV. at 769-771.

We agree with the district court's appraisal that the decision of this appeal is dependent upon whether the

---

[2] (Continued)

Further, Mayer Paving does not rely in this court on the fact that one of its competitors, Rock Road Construction Co., Des Plaines, Illinois, did work in Wisconsin, Illinois, Iowa, and Indiana, since it was established that Mayer Paving was not a competitor of Rock Road on any of its out-of-state work.

situation involved activates the guidelines of *Moore* or of *Borden*. Unfortunately, neither is factually squarely in point and ultimately we must determine what the congressional intent was with regard to the precise factual situation before us, in what we regard as a case of first impression. Nevertheless, because of their general pronouncements on the subject, we first turn to a consideration of *Moore* and *Borden*.

Certainly, the touchstone for analysis in the present area is Justice Douglas's opinion for a unanimous Supreme Court in *Moore*. In that case, Moore, was engaged in the bakery business in Santa Rosa, New Mexico, with none of its activities being in interstate commerce. The defendant was a corporation in competition with Moore for the local business in New Mexico. In addition to its intrastate business, the defendant was engaged in interstate commerce in that it sold bread in Farwell, Texas, with a truck originating in New Mexico. The plaintiff and the defendant became engaged in a price war in Santa Rosa, New Mexico, during which the defendant cut its price in Santa Rosa while holding its prices up in all other areas in which it was doing business, including its interstate business in Farwell, Texas. The Court held that such activity contravened the Clayton Act, as amended, even though the direct injury was purely intrastate. Mayer Paving relies heavily on the observation in *Moore* relating to the use of a treasury drawn from interstate business to finance impermissible local competition, 348 U.S. at 119, *compare Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 209 (5th Cir. 1969), and *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963), with *Littlejohn* v. *Shell Oil Co.*, 456 F.2d 225, 229 (5th Cir. 1972), *petition for rehearing en banc granted*, 470 F.2d 997 (5th Cir. 1973).[3a] But that issue is not really involved

[3a] Subsequent to the time that the drafting of this opinion was completed and the opinion had been circulated, this court learned that the Fifth Circuit, *en banc*, had vacated the earlier panel opinion insofar as it indicated

in the present case since *Moore* was a case of primary-line injury, injury to a competitor of the discriminator, and the present case involved secondary-line injury, injury to one of the customers of the discriminator. That distinction is well-established. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542-544 (1960), see also ROWE, PRICE DISCRIMINATION, supra, and it has substantial impact on the deposition of the present case.

Borden Company v. *Federal Trade Commission, supra*, which the district court below found to be controlling in the present case, while factually distinguishable is analogous to the present case. In *Borden*, this court refused to enforce the Commission's order because the alleged discriminatory sales from Borden's Portsmouth plant were without interstate indicia. "It [was] undisputed that the sales of milk were negotiated in Ohio, the milk was produced, processed and delivered in Ohio for resale in Ohio." 339 F.2d at 955. There is no suggestion that the Portsmouth plant sold any of its products in interstate commerce. It is that fact which, as Mayer Paving notes, distinguishes *Borden* from the present case. It scarely needs stating that the Borden Company was extensively engaged in interstate commerce. That is also true, although to a lesser extent, of both General Dynamics and Mead's Fine Bread in the *Moore* case, the latter defendant being one of several corporations having interlocking ownership and management in the same family. The pattern for growth of monopoly found by the Court

---

[3a] (Continued)
a lack of necessity for at least one discriminatory interstate sale. 42 U.S.L.W. 2114 (August 10, 1973). In the present opinion, we had found *Littlejohn* as originally written not dispositive. The superseding *en banc* opinion, of course, strengthens the result reached by the opinion in the present case before this court. Since we have reached the result we did irrespective of the original *Littlejohn* opinion, we have not deemed it necessary to revise the references in our opinion to the original opinion nor to refer further to the *en banc* opinion other than noting that it supports the result we have reached.

in the situation in *Moore*, a primary-line injury, does not exist in this secondary-line injury case. In the case of the secondary-line injury of the present type,[4] we are persuaded that interstate character of General Dynamics' overall business is not a controlling factor any more than it was in *Borden*.

However, General Dynamics did sell interstate from its Illinois operations and, as noted, the factual situation differs in this respect from *Borden*. Similarly, other cases cited by defendant are distinguishable either as involving allegations of purely interstate sales, *e.g.*, *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. denied*, 408 U.S. 928, and *Food Basket, Inc.* v. *Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967), or relying on the "flow of commerce" doctrine in which the court found that the goods had come to rest, *e.g.*, *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, *supra*, and *Walker Oil Co.* v. *Hudson Oil Co. of Missouri*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970), a doctrine which was inferentially undercut in Mr. Justice Clark's opinion for this court in *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana)*, 466 F.2nd 1163, 1166 (7th Cir. 1972).

In turning then for our decision to the wording of the statute we are reminded of Mr. Justice Frankfurter's appraisal that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic*

---

[4] As will be indicated later in the opinion, attention must be directed to the exact factual situation creating the issue for determination. Thus, it was stated that it is "too well known to require extensive exposition—that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon a secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores." *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543-4 (1960). The situation causing concern did show a pattern for the growth of monopoly where there was an impact directly upon competition and the injury was "commerce" related.

Canteen Company v. *Federal Trade Commission*, 346 U.S. 61, 65 (1953). We shall also attempt to follow his admonition in the same case "to confine ourselves as much as possible to what is in dispute here." For our present purposes, that which is in dispute is whether there is a violation of the Act where all of the purchases in which price discrimination existed made by both Mayer Paving and its competitors were intrastate and therefore not "in commerce."

For the resolution of the particular dispute we again examine the words of the statute: "where either or any of the purchases involved in such discrimination are in commerce . . . ." It is our view that the word "involved" when read against the underlying purpose of the antitrust laws, to protect competition, requires that only the purchases by Mayer Paving competitors and by Mayer Paving itself be considered in determining whether "either or any" discriminatory sale is "in commerce." We are fortified in this conclusion by the fact that §2(a) specifies that a price discrimination is actionable only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." Only those purchases which might injure competition are "involved" under the Robinson-Patman Act.

Mayer Paving attempts to argue applicability of *Moore* by variations of the factual situation here involved. We are not concerned with other factual situations but only the one here involved and whether it calls into play the sanctions of the Robinson-Patman Act. Essentially, we have in the particular situation an analogue to standing. The customer has standing only to raise and compare those sales which are injurious to his competition. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc., supra*, 363 U.S. at 342-343. The competitor of the seller, on the other hand, has more freedom under *Moore* since the Court has declared that the competitor of the seller is involved

in any sale which may be used to finance an intrastate price war in violation of the provisions of the Robinson-Patman Act. The analytical distinction involving the "competing customer" is discussed in Rowe, PRICE DISCRIMINATION, *supra* at 80. Similarly, the requirement that some evidence of competition exist to justify the invocation of this section of the Act is also found in *National Lead Co.* v. *Federal Trade Commission,* 227 F.2d 825, 836 (7th Cir. 1955), *rev'd on other grounds,* 325 U.S. 419 (1957). "For to the extent customers on different sides of a boundary line do not compete with each other, no adverse competitive effects on the customer level can ensue from the supplier's price variations." Rowe, PRICE DISCRIMINATION, *supra* at 179.

We do not find plaintiffs' reliance on *Littlejohn* v. *Shell Oil Co., supra,* persuasive. That case involved what one commentator has called "indirect primary-line competition." Case Comment, 57 MINN. L. REV. 1035, 1040 n. 26 (1973). The court was concerned with the "underwriting" theory found in the general language in *Moore,* discussed above. Here, there is no allegation that the buyers who allegedly received lower, non-justified prices were related to General Dynamics in any way similar to the manner in which the gasoline stations were related to Shell Oil and American Oil in the *Littlejohn* case.

Once we so limit the referent of "purchases involved," the clear language of the statute requires us to affirm the judgment n.o.v. for defendant since on this appeal Mayer Paving has not contended that any of the sales to its competitors or itself were "in commerce."[5]

Mayer Paving also challenges the jurisdiction of the district court to enter judgment on the counterclaim.

---

[5] Because of the result we have reached on this issue we find it unnecessary to consider Mayer Paving's arguments as to fraudulent concealment, statute of limitations, and recoupment. Similarly, we need not consider General Dynamics' cross-appeals as to the insufficiency of Mayer Paving's proof at trial.

Mayer Paving in its original complaint named only General Dynamics Corporation as a defendant. In its answer, General Dynamics included a counterclaim on behalf of Material Service Corporation. After it filed a reply to the counterclaim, Mayer Paving moved for summary judgment or dismissal of the counterclaim on the ground that Material Service Corporation was not a party to the action. Following some procedural haggling, the district court[6] in a memorandum opinion dated May 7th 1971, ordered Material Service Corporation joined as a party pursuant to Rule 19(a) (2) (i), Fed. R. Civ. P., and denied Mayer Paving's motion for summary judgment on the basis that the counterclaim arose out of the transaction or occurrence that was the subject matter of the complaint and was compulsory pursuant to Rule 13(a), Fed. R. Civ. P., thus relieving Material Service from the necessity of establishing independent jurisdiction grounds.

General Dynamics referred to this problem as "a quibble as to terminology—a misnomer—which the previous attorneys for the plaintiffs and the attorneys for defendant had not deemed of sufficient importance to correct by amendment of the complaint to add Material Service Corporation as a formal defendant." We do not view it as such, although some of the alleged discrimination went back to a time when Material Service, as a separate corporation, was the sole seller to Mayer Paving. Without any assertion of its relation to the complaint save for a vague reference as "Material Service Division of General Dynamics, now Material Service Corporation," various counterclaims were asserted by an entity never named in the complaint and never otherwise made a party to the cause. Defendant in its brief argues that any defect was waived by plaintiffs' failure to object or otherwise raise the issue in its reply to the counterclaim, analogizing it to the waiver of the defense of lack of jurisdiction over the person found in Rule 12(h) (1), Fed. R. Civ. P. But that analogy is inapposite. Lack of subject matter

[6] District Judge Bernard M. Decker, to whom the case was then assigned.

jurisdiction is not waivable and must be raised by the court on its own motion, Rule 12(h) (3), Fed. R. Civ. P.

We turn then to the ground upon which the district court relied, that Material Service Corporation should be joined as a party under Rule 19(a) (2) (i) since the disposition of the action "in its absence may as a practical matter impair its ability to protect [its] interest." The general policy of Rule 19, as with the Federal Rules of Civil Procedure in general, is "the impulse . . . toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 724 (1966) (footnote omitted).

Under the Rule, Material Service Corporation would seem to be an interested party. The disposition of the action may collaterally affect its rights since it is the successor to the alleged principal violator of the law, Material Service Division. Thus, Material Service Corporation is arguably suitable for joinder under Rule 19(a)(2)(i). The only question is does it meet the general requirement of Rule 19(a) that "joinder will not deprive the court of jurisdiction over the subject matter of the action." Thus, joinder may be inappropriate if its destroys diversity of citizenship. Jurisdiction in the present case is founded upon 28 U.S.C. §1337, which gives the district courts original jurisdiction to hear cases arising under Acts of Congress "regulating commerce or protecting trade and commerce against restraints and monopolies." Normally, this jurisdictional basis would be lacking since the present Material Service Corporation did not come into existence until after the date at which Mayer Paving stopped making the purchases alleged in the complaint. If we construe the assumption of the assets and liabilities[1]

[1] The record is not entirely clear on the matter of assumption of liabilities although the liabilities frequently are travelling companions of the assets, which here were assumed. Nevertheless, the matter was not disputed by Mayer Paving.

of the former Material Service Division of General Dynamics by Material Service Corporation as carrying over and giving Mayer Paving a right of action against the new corporation for the old division's alleged violation of the antitrust laws, then we have a suitable jurisdictional basis for the joinder.

Once we can determine that Material Service Corporation was properly joined as a party defendant, it is clear that the counterclaim was properly within the jurisdiction of the district court. A compulsory counterclaim under Rule 13(a), Fed. R. Civ. P., "may be interposed without meeting jurisdictional requirements because it is auxiliary to the original action. . ." *Chance* v. *Country Board of School Trustees of McHenry County, Ill.*, 332 F.2d 971, 973 (7th Cir. 1964). Since the counterclaim for the unpaid stone arises out of the transactions that are the subject matter of the complaint, the counterclaim is compulsory and there was no need for any independent jurisdictional basis. *G & M Tire Co.* v *Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D. Miss. 1964).

However, we need not rest our decision solely on the foregoing analysis supporting joinder of Material Service Corporation as a defendant. Disregarding form for substance, the court could have treated the motion as a motion under Rule 14(a), Fed. R. Civ. P., to implead Material Service Corporation as a third-party defendant. Had counsel for defendant in terms chosen this possibly preferable course the entire matter would have been considerably simplified. On the facts of this case, especially after our review of the pleadings and briefs, it would seem that the third-party complaint was what was really involved since General Dynamics was in effect saying that its new subsidiary, Material Service Corporation had assumed all of the liabilities of the old Material Service Division and was, therefore, liable over to it for any violations of the Robinson-Patman Act committed by Material Service Division.

The sixth sentence of Rule 14(a) then provides the basis for Material Service Corporation's claim against Mayer Paving: "The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff." The courts have split on the question of whether separate subject matter jurisdiction must be shown to sustain the third-party defendant's claim against the plaintiff. See 6 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: *Civil* §1458, at 311 n. 69 and §1444, at 229-234, esp. nn. 90 & 91. Even the commentators are in disagreement. Wright and Miller favor ancillary jurisdiction in this type of claim, 6 Wright & Miller, *supra*, §1444, at 234, and Moore indicates that it is inappropriate, 3 MOORE, FEDERAL PRACTICE ¶14.27 [2] (2d. ed.). We are persuaded that the better theory is to allow the claim to be brought under the ancillary jurisdiction power, especially since here the claim would have been a compulsory counterclaim subject to ancillary jurisdiction if the successor corporation had been originally named as a defendant. We agree with and adopt the reasoning of Circuit Judge Morgan in *Revere Copper & Brass Inc.* v *Aetna Casualty and Surety Co.*, 426 F.2d 709 (5th Cir. 1970), where this same question was analyzed and answered in favor of ancillary jurisdiction.

Thus, we affirm the district court's jurisdiction of the counterclaim on the alternative grounds that Material Service Corporation was properly joined as a defendant or that it was properly made a third-party defendant.

For the reasons given hereinbefore, the judgment of the district court is affirmed.

AFFIRMED.

MR. JUSTICE CLARK (dissenting):

This is the first dissent that I have filed in my several sittings with this Circut, and it is, therefore, with regret that I find myself in disagreement here. However, the appellant, Mayer Paving and Asphalt Company, has been deprived of a $498,204.00 verdict and judgment by the granting of a motion *non obstante veredicto,* and, in my judgment, the sole ground for such precipitous action is entirely unsupportable. Indeed, if finally sustained, it will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115 (1954).

1. I say the ground upon which the motion *non obstante veredicto* was granted is unsupportable because the learned trial judge misapplied the holding of this court in *Borden Company* v. *FTC,* 339 F. 2d 953 (7th Cir. 1964). As I read it, *Borden* is not apposite. In it the Federal Trade Commission indulged itself in a *non sequitur,* i.e., that since Borden was in interstate commerce, it necessarily followed that all of its products were also in interstate commerce. This Circuit, I submit, correctly held that Borden's being in interstate commerce was not enough; "it must also be shown that the sale complained of was one occurring in interstate commerce." 339 F.2d 953, 955. In *Borden,* there was a complete absence of interstate sales from any of its plants in Ohio and no connection whatever between its local sales in Ohio and its interstate sales. The reversal was based entirely on these facts. 339 F.2d 953, 955.

2. Here exactly the opposite is shown by the record. Mayer's claim and proof were based on the shipments of crushed limestone by General Dynamics[1] from Illinois at discriminatory prices during 1958-1968 to asphalt manufac-

---

* United States Supreme Court, retired, sitting by designation.

[1] Throughout my dissent I have adopted the designation "General Dynamics" given by the majority to the appellees

turers and paving contractors in Illinois and Indiana. The sales were made from five quarries of General Dynamics—all located in Illinois—and one of which was only a few miles from the Indiana border.[2] It was the closest source of crushed limestone for operators located in Indiana, especially East Chicago, Hammond, Gary and other nearby cities. A sales office for this quarry was located in LaPorte, Indiana, and a distribution yard at Gary. The record also shows that four Indiana paving contractors purchased over $4.5 million of crushed limestone and other products from General Dynamics which were shipped from its quarries in Illinois during the decade involved in the suit. As the trial judge found, there were "substantial sales of like goods" made by General Dynamics from Illinois quarries to Indiana customers; and the 1968 total sales of General Dynamics were some $29 million which were divided among customers in the two states.

Mayer's purchases from General Dynamics during the decade involved ran $5.4 million alone. This large volume, it was claimed, resulted from a requirements contract[3] required

---

[1] (Continued)
and cross-appellants. Originally the company was known as Material Service Corporation; General Dynamics Corporation obtained the assets of Material Service in 1959 and the latter was operated as a division of General Dynamics, known as Material Service Division. In 1969 the latter was re-incorporated as a wholly owned subsidiary.

[2] The five quarries were Riverside, Federal, Stearns, Romeo and Thornton. The latter was regarded as the largest commercial quarry in the world and is located a few miles from the Indiana border at the intersection of the Tri-State.

[3] The contract was dated April 15, 1957, and its original draft provided that Mayer would purchase all of its requirements from Material Service Corporation for the ensuing five years but the final draft was changed to 80 percent of Mayer's requirements. The consideration was a loan or line of credit for $300,000 made by Material Ser-

in a credit or loan agreement between General Dynamics and Mayer obligating the latter for a five-year period to purchase 80 percent of its total limestone, etc., requirements from General Dynamics. Although the contract provided for the payment of "current market prices" on all orders, the proof revealed that Mayer was charged from 10 cents to 47 cents more per ton than favored customers of General Dynamics. Among its favored customers were the four Indiana operators mentioned, one of whom (A. Metz Inc.) competed with Mayer. Metz paid from 20 cents to 23 cents per ton less than General Dynamics charged Mayer, while Walsh and Kelly's (at Griffith, Indiana) price from General Dynamics ran as much as 30 cents less than Mayer's. There were also several General Dynamics' favored customers in competition with Mayer located in Illinois. For example, the Skokie Valley Asphalt Company (Des Plaines, Illinois) regularly paid between 32 cents to 47 cents less per ton during the damage period for crushed stone supplied by General Dynamics than Mayer was charged. Both the Indiana and Illinois price discriminations were uncontradicted at the trial and were clearly deleterious to genuine business competition.

It appears to me that a plain reading of §2 (a) prohibits such discrimination. It provides that if *"either* or *any* of the purchases involved in such discrimination *are in commerce"* then all are prohibited. The majority interprets the all-inclusive phrase "either or any" to apply to sales to Mayer only insofar as the presence of commerce is concerned. *Mead's Fine Bread* holds the opposite. Here the allegation and proof, uncontradicted, are that some local sales (from the same Illinois quarries) in Illinois as well as interstate ones to Indiana customers were at much lower prices than like sales to Mayer and other Illinois

---

[3] (Continued)
vice Corporation. The validity of such an arrangement is suspect. See my opinion in *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co., Inc.*, Civil No. 48234, U.S. Dist. Ct., N. Dist. Cal. (Aug. 16, 1972).

customers. I always thought that this was a practice that §2(a) was specifically intended to prohibit. Here, while the quarry involved was only a few miles from Indiana, still Illinois customers were charged more for like material than were Indiana ones, without respect to delivery costs, etc. General Dynamics answers that Mayer was not a competitor in Indiana. Although this is not strictly true since it did compete somewhat unsuccessfully with A. Metz Inc., still Mayer was prevented from effectively competing across the border in Indiana because of the higher charges exacted from it. After preventing it from competing, General Dynamics now says that Mayer is deprived of the protections of § 2(a) because he did not compete. Such an interpretation transposes §2(a) into a tool of discrimination rather than a protection. The result is that interstate competition is lessened and Mayer is destroyed.

3. Strangely enough, the majority relies on the old and honored doctrine of standing to deprive Mayer of its jury verdict and judgment. The majority says: "The customer has standing only to raise and compare those sales which are injurious to his competition." Mayer does not compete in Indiana, it finds. Under the circumstances here this conclusion which the majority says is critical to its decision is a *non sequitur*. This record shows that General Dynamics sold all of the four Indiana operators involved in the discriminatory activity at such a lower rate per ton than it sold Mayer that the latter could not compete with them in Indiana. The record also shows that Mayer tried to compete in Indiana with A. Metz but failed. Indeed on one job there Mayer was obliged to sublet and buy the necessary material from a supplier other than General Dynamics. Finally, the record clearly shows that General Dynamics' action prevented Mayer and other Illinois asphalt manufacturers and paving contractors from competing in Indiana by its discriminatory pricing to favored customers. To hold that Mayer had no standing to sue in such a factual situation is to repudiate the mandate of Congress in § 2(a) and creates a barrier that in the final analysis will operate as a repealer of

this important section of the Act insofar as discrimination among customers of the same seller is concerned. The intent of the Congress in this regard is clearly stated by Congressman Utterback, manager of the bill in the House:

> "Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor *either to the disadvantage of the other*; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. . ." 80 Cong. Rec. 9417. (Emphasis supplied).

4. The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co., supra,* is inapposite because it involved primary competition between Moore and Mead. I find nothing in § 2(a) that limits its coverage to primary competition cases. On the contrary, the Act's purpose was to prevent all discriminatory pricing "where the effect of such discrimination may be substantially to lessen competition . . ." That interstate competition was substantially lessened in the particular geographical situation involved here is without peradventure; that the discriminatory pricing, in the words of § 2(a) "injured, destroyed or prevented" Mayer from competing with "customers" of General Dynamics located in Indiana was found to be true by the jury and was embodied in the judgment entered by the court and now set aside. Section 2(a) says nothing about "primary" or "secondary" lines of competition. Its intent, as stated by its manager, Congressman Utterback, was to condemn all discriminatory pricing "injuring" interstate commerce. To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts. Rather than excepting from § 2(a) the customers of the seller—as the majority does unless they are competing with one another—for the purposes of determining the presence of interstate commerce—§ 2(a) *specifically* includes them and in the peculiar factual situation here requires, insofar as commerce is concerned, no proof of existing competition among the

customers of the same seller. When it comes to the assessment of damages, competition might be crucial. While the factual situation was different in *Mead's Fine Bread*, where the interstate operation afforded a treasury for destroying local competition, the thrust of *Mead's Fine Bread* also covers this case. Indeed, in *Mead* it was admitted that the Act covered situations where "interstate commerce is in some other way used to destroy competition or is injured or impaired by a result of unlawful acts." 348 U.S. 115, 119. Here interstate commerce was used and unlawful acts were perpetrated in a continuous pattern for over ten years in sales made in interstate commerce that not only lessened competition but injured, destroyed or prevented Mayer from competing.[4]

5. General Dynamics makes no further attack on the judgment other than the sufficiency of the proof of damages and its asserted good faith effort to meet competition. There is no evidence in the record supporting the latter claim that would grant General Dynamics forgiveness under the Act. The proof on damages appears, as the jury found, quite sufficient under the decided cases and should not be disurbed.

6. This case was submitted to a jury after three weeks of testimony. No point is made of any error in the instructions or the theory upon which the case was submitted, other than the jurisdictional point as to the existence of interstate commerce about which I have spoken. I find that it has no merit.

---

[4] The majority also emphasizes that the "pattern for the growth of monopoly" found to be present in *Mead's Fine Bread* is non-existent here. While this is true, we must remember that § 2(a) was also specifically aimed at discriminations which may "substantially lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

The Seventh Amendment provides that "no fact tried by a jury, shall otherwise be re-examined in any Court of the United States," U.S. CONST. amend. VII. As I see it the verdict of this jury should not have been "re-examined" and overturned nor the judgment set aside. It is late enough now to correct this mistake. The original judgment should be reinstated.[5]

[5] With reference to the counterclaim of General Dynamics, I agree with the majority that it should be affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

October 1, 1973

Before

Hon. TOM C. CLARK, *Associate Justice of Supreme Court**
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

MEMORANDUM AND ORDER
(Filed June 9, 1972)

This is an antitrust action brought under the Robinson-Patman Act. The plaintiffs, Mayer Paving and Asphalt Company, an Illinois corporation, and Lee O. Mayer, sole surviving partner of Mayer Paving Company, hereinafter referred to collectively as "Mayer", complain that the defendants General Dynamics Corporation and Material Service Corporation have discriminated against Mayer in the price which was charged for crushed limestone.

The case was tried before this court and a jury. At the conclusion of all the evidence the case went to the jury and it returned a verdict in the amount of $166,068.00.

---

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

Pursuant to the statute this verdict was trebled by the court and a judgment in the amount of $498,204.00 was entered in favor of the plaintiffs, together with costs of suit, including reasonable attorney's fees.

The case is now before this court on the defendants' Motion for Judgment N.O.V. The first ground advanced by the defendants, and the one which this court finds decisive, is that none of the sales being compared to show discrimination occurred in interstate commerce.

Mayer at all times relevant hereto was in the asphalt manufacturing and paving business, with its principal place of business in Skokie, Illinois. Mayer's business was conducted almost exclusively in northern Cook County, Illinois. The plaintiff's evidence shows only one insignificant driveway job in Indiana during the relevant period. Furthermore plaintiff's evidence shows that its competitors were engaged exclusively in intrastate commerce insofar as the asphalt business is concerned. The defendants on the other hand are large interstate corporations which do substantial business in Indiana.

The plaintiff's theory of the case is based on the Supreme Court decision in the case of *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In that case, Moore, was engaged in the bakery business in Santa Rosa, New Mexico with none of its activities being in interstate commerce. The defendant was a corporation in competition with Moore for the local business in New Mexico. In addition to its intrastate business, the defendant was engaged in interstate commerce in that it sold bread in Farwell, Texas with a truck originating in New Mexico. The plaintiff and the defendant became engaged in a price war in Santa Rosa, New Mexico during which the defendant cut its price in Santa Rosa while holding its prices up in all other areas in which it was doing business including its interstate business in Farwell, Texas. In the face of the contention by the defendant that any injury shown as a result of the price cutting was to a local competitor and in no way related to interstate com-

merce, the Supreme Court found that by holding the line on interstate sales while engaging in a price war with local competitors, Mead had in effect underwritten the destructive price cutting with the profits from interstate profits to underwrite the destruction of a local business was barred by the Robinson-Patman Act.

Since *Moore* the various circuits have considered its applicability to various fact situations and have come up with varying results. It is however the obligation of this court to follow the holdings by the Seventh Circuit. In the case of *Borden Company* v. *Federal Trade Commission,* 339 F2d 953 (1964), the Court of Appeals for the Seventh Circuit considered a case which on its facts was very similar to the one at the bar. Borden was a large interstate concern with business in twenty-nine states. In the course of this business Borden sold to local merchants in Portsmouth, Ohio at prices which were found to be discriminatory in favor of certain local merchants. It was further found that the milk involved was processed and produced in Ohio. The F.T.C. found that: "Since it is impossible to divorce The Borden Company and its products, if The Borden Company is in commerce, so must be all its products." Based on this the Commission found that the local discrimination satisfied the commerce requirement of the Act.

The Seventh Circuit on appeal reversed the Commission's holding. It found itself in accord with the dissent of Commissioner Elman. The court held that three variants of the commerce requirement must be satisfied as Elman said:

> "First, respondent must be 'engaged in commerce'; second, the unlawful discrimination must occur 'in the course of such commerce'; third, 'either or any of the purchases involved in such discriminations' must be 'in commerce.'"

The court went on to hold that given these requirements the burden of establishing jurisdiction was not discharged

by showing that the respondent was an interstate concern or that it makes interstate sales. The court held that it was necessary to show that one of the challenged sales was in interstate commerce, and that the showing of discriminatory prices between local competitors did not fulfill this burden.

The *Borden* case is one of a series of cases which distinguish "primary line injury", that is injury to a competitor of the seller, from "secondary line injury", that is injury to competition between customers of the seller. Using this analysis the *Moore* case is easily distinguishable from the case at the bar in that it is clearly a "primary line" case whereas the present case is clearly a "secondary line" case.

If this case were one of first impression coming upon the heels of the *Moore* case, this court would not have made the distinction outlined above in determining whether jurisdiction existed under the "in commerce" requirements of the act. This court would have found that a showing of substantial interstate sales of like goods is sufficient to satisfy the jurisdictional requirements.

This however is not a case of first impression and this court feels compelled to follow the holding in the *Borden* case. If the *Borden* case is not the law of this Circuit it is up to the Court of Appeals to say so.

Although it is the judgment of this court that *Borden* is applicable, the court let this case go to the jury on the *Moore* v. *Mead* theory with the idea of obviating a need for a second trial, if it is the judgment of the Court of Appeals that *Moore* controls.

For the reasons cited herein the defendants' Motion for Judgment N.O.V. is granted. Since this disposes of the motion, it is not necessary to reach the other grounds raised by defendants in their motion.

It is hereby Ordered that the verdict of the jury in the amount of $166,068.00 and the judgment of the court for $498,204.00 entered thereon be and they hereby are vacated and set aside. Judgment is hereby entered in favor of defendants and against plaintiffs, together with costs.

ENTER:
/s/ J. S. Perry
Judge

Dated: June 9, 1972
Chicago, Illinois

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed September 28, 1971)

This cause coming on to be heard upon the Motion of defendant and counter-plaintiff, Material Service Corporation ("Material Service"), for summary judgment as to the issues of liability in its three count Counterclaim, the Court having considered such motion, the affidavit submitted in support of such Motion, and the Memoranda of counsel for the parties and being fully advised in the premises, now finds:

FINDINGS OF FACT

1. Defendant and Counter-plaintiff Material Service is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in Chicago, Illinois. It is a wholly-owned subsidiary of General Dynamics Corporation ("General Dynamics").

2. Plaintiff and Counter-defendant Mayer Paving and Asphalt Company ("Mayer Paving") is a corporation organized and existing under the laws of the State of Illinois, having its principal place of business in Skokie, Illinois.

3. Plaintiff and Counter-defendant Lee O. Mayer is the sole surviving partner in the former partnership of Sydney Mayer and Lee O. Mayer doing business as Mayer Paving Company.

4. Mayer Paving is in default in its payment for goods sold and delivered to it by Material Service between March 1, 1967 and April 30, 1969.

5. On or about April 22, 1957, for value received, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, executed and delivered to Material Service Corporation, an Illinois corporation, a promissory note whereby they promised to pay Material Service Corporation, an Illinois corporation, on or before January 15, 1961 the sum of $300,000 with interest thereon at the rate of five per cent (5%) per annum. A copy of such note is attached to the Counterclaim as Exhibit "B". Lee O. Mayer is in default in her payments on such note. As security for the payment of such note, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, at the same time executed and delivered to Material Service Corporation, an Illinois corporation, a real estate mortgage and a chattel mortgage in favor of Material Service Corporation, an Illinois corporation. The real estate mortgage was recorded with the office of the Recorder of Deeds of Cook County, Illinois, on April 22, 1957 as Document No. 1688314. A copy of the real estate mortgage is attached to the Counterclaim as Exhibit "C" and a copy of the chattel mortgage is attached to the Counterclaim as Exhibit "F".

6. On or about February 1, 1960, for value received, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, executed and delivered to the Material Service Division of General Dynamics, a promissory note whereby they promised to pay Material Service Corporation of General Dynamics on or before January 15, 1961, the sum of $300,000 with interest thereon at the rate of five per cent (5%) per annum. A copy of such Note is attached to the Counterclaim as Exhibit "D". Lee O. Mayer is in default in her payments on such note. As security for the payment of such note, Lee O. Mayer individually and as

co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, at the same time executed and delivered to the Material Service Division of General Dynamics a real estate mortgage and a chattel mortgage in favor of Material Servise Division of General Dynamics. The real estate mortgage was recorded with the office of the Recorder of Deeds of Cook County, Illinois, on February 23, 1960 as Document No. 17787996. A copy of the real estate mortgage is attached to the Counterclaim as Exhibit "E" and a copy of the chattel mortgage is attached to the Counterclaim as Exhibit "G".

7. On or about February 1, 1960, for value received, Mayer Paving unconditionally guaranteed the notes dated April 22, 1957 and February 1, 1960 and more fully described in Findings Nos. 5 and 6. Mayer Paving is in default on its obligations assumed in such guarantee. A copy of such guarantee is attached to the Counterclaim as Exhibit "H".

8. On or about April 4, 1968, for value received, Mayer Paving and Lee O. Mayer executed and delivered to the Material Service Division of General Dynamics a promissory note whereby they promised to pay the Material Service Division of General Dynamics on or before March 31, 1969 the sum of $100,000 with interest thereon at the rate of seven per cent (7%) per annum. A copy of such note is attached to the Counterclaim as Exhibit "A". Mayer Paving and Lee O. Mayer are in default in their payments on such note.

9. Material Service Corporation, an Illinois corporation, was merged into General Dynamics, a Delaware corporation, effective December 31, 1959, and ownership of the note and mortgages dated April 22, 1957 and more fully described in Finding No. 6 was transferred from Material Service Corporation to General Dynamics as a result of said merger.

10. From January 1, 1960 through March 31, 1969 the business and properties of Material Service Corporation,

an Illinois corporation, which was merged into General Dynamics, were operated as the Material Service Division of General Dynamics. Material Service Division of General Dynamics owned the notes and mortgages dated April 22, 1957, February 1, 1960 and the additional note dated April 4, 1968, all as more fully described in Findings Nos. 5, 6 and 8 and the guarantee dated February 1, 1960 and more fully described in Finding No. 7.

11. On March 31, 1969, ownership of the notes and mortgages referred to in Findings Nos. 5, 6 and 8 and the guarantee referred to in Finding No. 7 was transferred by the Material Service Division of General Dynamics to Material Service Corporation, a Delaware corporation, which is a defendant and counter-plaintiff in this cause.

12. Since at least April 22, 1957, Lee O. Mayer, individually and as co-partner with Sydney R. Mayer, doing business as Mayer Paving Company, was the owner in fee simple of the following described real estate situated in the County of Cook, State of Illinois:

> The South 3 acres of that part of the North ½ of the West ½ of the South West ¼ of the South East ¼ of Section 26, Township 41 North, Range 13 East of the Third Principal Meridian which lies West of East 240 feet thereof (as measured along the North line of the South West ¼ of the South East ¼ aforesaid) in Cook County, Illinois, and known as 7300 St. Louis Avenue, Skokie, Illinois.

13. Since at least April 22, 1957, Lee O. Mayer was the owner of an undivided one-third interest in fee simple in the following described real estate situated in the County of Cook, State of Illinois:

> The North West ¼ of the South West ¼ of the South East ¼ of Section 26; Township 41 North, Range 13 East of the Third Principal Meridian (except the East 240 feet of the said North West ¼ as measured along the North line thereof) and except the

South 3 acres of that part which lies West of the East 240 feet of said North West ¼ in Cook County, Illinois.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter.

2. Material Service has established that Mayer Paving is in default in its payments for goods sold and delivered to it by Material Service during the period from March 1, 1967 to April 30, 1969, and that Mayer Paving is liable for the unpaid balance owing for such goods.

3. Material Service has established that Mayer Paving and Lee O. Mayer are in default in their payments on the note dated April 4, 1968 and more fully described in Finding No. 8 and that Mayer Paving and Lee O. Mayer and jointly and severally liable for the unpaid balance owing on such note.

4. Material Service has established that Lee O. Mayer is in default in her payments on the note dated April 22, 1957 and more fully described in Finding No. 5, and that Lee O. Mayer is liable for the unpaid balance owing on such note.

5. Material Service has established that Lee O. Mayer is in default in her payments on the note dated February 1, 1960 and more fully described in Finding No. 6 and that Lee O. Mayer is liable for the unpaid balance owing in such note.

6. Material Service has established that Mayer Paving unconditionally guaranteed payment of the notes dated April 22, 1957 and February 1, 1960 and more fully described in Findings Nos. 5 and 6, and that Mayer Paving is in default on its obligations assumed in such guarantee and that Mayer Paving is jointly and severally liable with Lee O. Mayer for the unpaid balances owed on such notes.

7. An alleged violation by General Dynamics and/or Material Service of the Robinson-Patman Act cannot be asserted as an affirmative defense or by way of recoupment in an action for collection of moneys owed for goods sold and delivered or for moneys owed on notes. *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 752-54, 757 (1947).

8. Lee O. Mayer and Mayer Paving failed to introduce any evidence that the note referred to in Finding No. 6 and the guarantee referred to in Finding No. 7 were only conditionally delivered to the Material Service Division of General Dynamics. In any event, evidence of oral conditions to such note and guarantee would be inadmissible for reasons of the parol evidence rule. *Chandler* v. *Chandler*, 326 Ill. App. 670, 63 N.E. 2d 272 (1945). In addition, a refusal to loan additional money is no defense to an action seeking to recover moneys previously loaned.

9. Unless the amount owed by Mayer Paving and Lee O. Mayer are stipulated to by the parties, such amounts will be determined at the trial of the cause in chief. Material Service may request an earlier prove-up of its damages, if it feels such action is necessary to protect its rights as determined by these Findings of Fact and Conclusions of Law.

ENTER:

/s/ J. S. Perry
District Judge

Dated: September 28, 1971

MEMORANDUM OPINION
(Filed May 7 1971)

This is a class action brought by a paving contractor against a supplier of crushed limestone used in paving highways and other large flat surfaces for an alleged violation of the Robinson-Patman Act (Count I) and the Sherman Act (Count II). Defendant is General Dynamics Corporation, whose Material Service Division supplied the crushed stone during the period at issue in the complaint. Plaintiff Mayer Paving and Asphalt Company has named itself to represent a class of paving contractors allegedly discriminated against in the price of stone sold by defendant.

The dispute in this case grows out of the chameleon-like quality of Material Service. Prior to December 31, 1959, Material Service Corporation was a separate entity, unrelated to General Dynamics. In 1959, the two corporations merged and Material Service become a division of General Dynamics. Then in April of 1969 Material Service was made a separate corporate entity again, becoming a wholly-owned subsidiary of General Dynamics.

Only General Dynamics was named as defendant in this action. However, the acts complained of began in the year 1958, when Material Service was still a separate corporate entity. Indeed, Mayer Paving recognizes in its complaint (¶ 4) that its cause of action is against Material Service Corporation up until the time of the merger, and from that time forward it is against General Dynamics. It is also clear that the assets of the old Material Service Division of General Dynamics now belong to the post-1969 Material Service Corporation.

Under the circumstances, Material Service Corporation is a party to be joined if feasible. F.R.Civ.P. §19(a) (2) (i). It claims an interest in the subject of the action and is so situated that the disposition of the action in its absence may as a practical matter impair its ability to protect that interest. See *Evergreen Park Nursing and*

Convalescent Home, Inc. v. *American Equitable Assurance Co.*, 417 F.2d 1113, 1115 (7th Cir. 1969). Material Service is subject to service of process in this jurisdiction, and joinder will not deprive the court of jurisdiction over the subject matter, 28 U.S.C. §1331, hence it should be made a party defendant. F.R.Civ. P. §19(a); *cf First Financial Marketing Services Group* v. *Field Promotions, Inc.*, 286 F.Supp. 295 (S.D.N.Y. 1968).

Material Service has filed a three-count counterclaim. It seeks to recover the price of goods sold and delivered to Mayer Paving (Count I), the balance due on a promissory note (Count II), and the proceeds from a mortgage foreclosure on Mayer Paving's property (Count III). The transactions giving rise to Count I, the sale and delivery of goods by Material Service to Mayer Paving, are the same ones in which, according to the allegations of the complaint, Material Service charged discriminatory prices. The notes involved in Counts II and III, even though executed as early as 1957 (Count III), were used, to some extent, to purchase goods from Material Service, which (again) were allegedly priced discriminatorily. Hence, it is clear that the counterclaim arises out of the transaction or occurrence that is the subject matter of the complaint, and being compulsory, independent jurisdictional grounds are not necessary. F.R.Civ.P. §13(a); *G & M Tire Co.* v. *Dunlop Tire & Rubber Corp.*, 36 F.R.D. 440, 441 (N.D.Miss 1964).

On October 8, 1970, Material Service moved for partial summary judgment on its counterclaim. None of the plaintiffs responded to the motion, either with briefs or affidavits. Moreover, Mayer Paving's original counsel withdrew from the case and was replaced by new counsel, who has not responded to the motion. Thus while Material Service may be technically entitled to summary judgment at this point, F.R.Civ.P. §12(e), I feel compelled not to grant it at this time. Plaintiff's counsel is sufficiently new to the case and at least should be given the opportunity to respond to the motion by the prompt filing of a brief, with counter-affidavits, if desired.

Accordingly, it is ordered that Material Service be made a party defendant in this action. The order of January 21, 1971, granting plaintiffs' motion for summary judgment dismissing Material Service's counterclaims is hereby vacated, and the counterclaims are reinstated in this action. Finally, plaintiff is given ten days to respond to the motion of Material Service for partial summary judgment, with five days for defendant's response.

ENTER:

/s/ Bernard M. Decker
United States District Judge

Dated: May 7, 1971.